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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

CARL ALDO MARZANI
Petitioner,

vs.

UNITED STATES OF AMERICA

No. 816

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR THE PETITIONER

Pursuant to Paragraph 4(a) of Rule 28 of the Revised Rules of this Court, petitioner submits this Reply Brief in reply to the Brief in Opposition for the United States:

1. In its Brief, the Government does not deny that the questions raised by petitioner are of general importance in the loyalty program, in the administration of criminal justice in the federal courts, and in connection with the supervision of this Court over the Courts of the District of Columbia. Its sole ground for opposition is that on the facts and rulings in this particular case, petitioner's contentions present no question of merit which requires this Court's examination (Gov't. Br. p. 29), and therefore, pre-

sumably, the questions of general importance raised by petitioner are not reached.[1] Under these circumstances, this reply brief is primarily limited to meeting the government's contentions on the merits of this case.

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[1]In its anxiety to avoid a review of this case, the government seeks to minimize a genuine conflict between the decision of the court below and the decision of the Court of Appeals for the Second Circuit in *Gottfried* v. *United States,* 165 F. 2d 360, 367-368, cert. denied March 29, 1948, with respect to the construction to be given to the Suspension Act, U. S. C. Title 18 Supp. V, 590 (a) (1) suspending the running of the statute of limitations applicable to certain offenses (Gov't. Br. p. 18). The court below decided this issue, correctly, we submit, in our favor, and we rest on that decision, predicating our claim of prejudicial error, in part, on the error found by the court below in the pertinent rulings and charge of the trial court.

The primary ground for the government's assertion that the decision in the *Gottfried* case is correct and that of the court below erroneous, with respect to the conflict, is that the legislative history of the suspension statute indicates a specific intent to have that statute apply to offenses under Section 35A of the Criminal Code, the provision here involved (Gov't Br. p. 18).

The legislative history of the Suspension Act and its application to Section 35A was exhaustively briefed by both sides in the court below (Br. for Appellant 9-38; Br. for Appellee 8-30; Reply Br. for Appellant 1-9). The only reference to Section 35A of the Criminal Code in this connection appears in Section 19(d) of the Contract Settlement Act 58 Stat. 649 which provides that "the provisions of Section 35A . . . shall apply to any statement, representation, bill, receipt, voucher, roll, account, claim certificate, affidavit or deposition made or used or caused to be made or used *for any purpose under this Act or any regulations pursuant to this Act* (italics supplied).

Section 19 (c) (1) of the Contract Settlement Act provides, in language similar to that of Section 35A, that "every person who makes or presents to any officer, agent or employee of any government agency any claim, bill, receipt, voucher, statement, account, certificate, affidavit or deposition knowing the same to be false, fraudulent or fictitious . . . for the purpose of securing or obtaining . . . any benefit, payment, compensation, allowance, loan, advance or emolument from the United States . . . in con-

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2. In answering petitioner's first contention that his conviction under Counts 10 and 11 of the indictment is constitutionally invalid, the government sets up a row of straw men, which it proceeds to demolish, without ever having faced the real adversary and coming to grips with it. The government states "Petitioner's first contention (Pet. 16-23) is that Counts 10 and 11 do not charge violations of Section 35A of the Criminal Code because the false statements in question were made informally and were not made under oath and were not stenographically transcribed. . . . Petitioner's argument is that his deception is not punishable because he was not first sworn and because there is no stenographic transcript of the conference." (Gov't's Br. 19, 21). This statement of our position is erroneous and misleading. Petitioner's contention does not go merely to the sufficiency of the indictment, nor is it limited to the specific grounds stated by the government. Our position is that the statute itself cannot be constitutionally applied to make criminal false statements uttered under all the circumstances shown in the trial of Counts X and XI, because, as those circumstances show, petitioner was denied the procedural safeguards which would have defined the crime, enjoined the obligation, and provided suitable notice of criminal consequences, which this Court held in *United*

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nection with the termination, cancellation, settlement, payment, negotiation, renegotiation, performance, procurement, or award of a contract with the United States . . ." shall be subject to specified civil liabilities, based in part on the pecuniary loss sought to be imposed on the United States.

In the case at bar, the trial court correctly charged the jury that "pecuniary or monetary loss is not an element of the offense, so that the government is not required to prove that the government suffered a pecuniary loss in connection with the offense here charged" (R. 41).

States v. *Gilliland*, 312 U. S. 86, 91 (1940) are required to save the statute from the objection of unconstitutional indefiniteness. Petitioner's claim as to the invalidity of the conviction under Counts 10 and 11 rests, therefore, not merely on the ground that the statements were informal, unsworn, and not recorded, but on the whole congeries of these and other factors, noted in our Petition pp. 9-10, 18-20, which conclusively demonstrate, we submit, that the statute as applied did not, as constitutionally required, adequately and under definitely ascertainable standards of guilt, inform petitioner that his statements, if false, would be criminal.

The *Zavala*[2] case, which the government cites (Gov't. Br., p. 21) to demolish the straw man of an oral and unrecorded statement, makes petitioner's contention even clearer. In that case, defendant presented to a customs inspector a written baggage declaration in which he omitted to state that he was bringing in any currency. Having been given an opportunity to amend his declaration, he caused it to be amended by authorizing the customs inspector to add a false statement to the declaration. In the course of the examination of defendant and his baggage, one of the government agents said to him "There is a law which has been enacted, a Presidential proclamation of April 6, 1940 which prohibits the bringing in of currency into the United States of any denomination, either this country or foreign, without first declaring it, so that it can be run through the Federal Reserve Channels to be checked. If you do not declare your currency, all of it, you will be prosecuted, according to the violations and the penalties

[2]*United States* v. *Zavala*, 139 F. 2d 830, 831 C. C. A. 2 (1944).

set forth in this Presidential proclamation" (139 F. 2d 829-830). The matter was one within the jurisdiction of the United States, the court held, by virtue of General Ruling 6A, Executive Order 8389, and the Trading with the Enemy Act, which covered the importation of currency into the United States (id. 832).

In the case at bar, there was nothing comparable in the circumstances of the Panuch interview, either in regulations or the equivalent offered which suitably informed petitioner of the matter within the jurisdiction of the United States or the criminal consequences involved.

Similarly, the statute as applied in the *Spivey* case[3], cited by the Government (Gov't. Br. Mimeo., p. 21, ftn. 10) punished false and forged statements made on Commodity Credit Corporation cotton producers' notes on which defendant secured credit through private banks, which assigned the notes, believing them genuine, to the Commodity Credit Corporation. There, the false statements were made to defraud an agency of the United States of money and, as the facts indicate, the applicability of the statute to bring home to defendant the particular matter within the jurisdiction of the United States and the criminal consequences involved was never seriously in question (109 F. 2d 183, 184-185).

The government is in error, therefore, in contending that "each of the elements of the offense as described by Section 35A is indisputably present in the case at bar." (Govt's Brief pp. 20-21). The undisputed and conceded facts as to the private, informal and unregulated nature of the interview with Panuch disclosed a situation which nega-

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[3]*United States* v. *Spivey*, 109 F. 2d 181, C. C. A. 5 (1940) cert. denied 310 U. S. 631.

tived the formality of the charge in the indictment, failed to put petitioner on notice that the interview had risen to the dignity of a matter within the jurisdiction of the United States, and provided no basis for the jury, on the issue of knowledge and wilfulness, to pass on the constitutional issue involved which had been ruled on by the trial court and withdrawn from the jury (R. 22, 25, 40).

The second ground on which the government seeks to uphold the decision of the court below is that, in applying the statute to the facts of this case, it has not sought to prosecute for false statements made by one government employee to another in a casual conversation, where the urgent necessity of truthfulness might not have been plain (Gov't. Br. p. 20). The government admits, however, that the interview was not in conformity with any regulations which provide for the hearing of charges against employees, (id. p. 22 ftn. 11); that petitioner did not seek a formal hearing (id. p. 22) but sought and obtained a private conference (id. p. 22 ftn. 11) with Panuch, with whom he had "a good personal relationship" (id. p. 23) and that his statements were unsworn, unwitnessed and unrecorded (id. p. 21). The government does not deny that the only two participants addressed each other as "Carl" and "Joe" throughout the conference; that Panuch was not merely Deputy Assistant Secretary in charge of Administration but also petitioner's superior in channels (R. 176); that the interview was at petitioner's request and not required; that the conference was not a removal proceeding but a discussion about a request for a voluntary resignation; that the requirements of Civil Service Rule XII and Departmental Circular 222, if applicable, were not complied with or their equivalent offered; that petitioner's statements were voluntary and

made under no obligation which had been enjoined; that Panuch was without knowledge of the previous interrogations on the same subject matter by the F. B. I. and the Commission; that the conference ranged over a wide variety of topics and lacked all the indicia of a hearing on a matter within the jurisdiction of the United States as provided by the Regulations of the Loyalty Review Board of the Hearing Procedures of the State Department (Pet. 9-10, 17-20). Nothing in the interview compared with the circumstances surrounding the false statements in the *Zavala, Spivey* (supra) or other cases cited by petitioner, in which the statute has been upheld (Pet. 22 ftn. 21).

The government rests its contention that the conference was not a casual one on the ground that Panuch, who had authorized the request for petitioner's resignation, regarded the matter seriously and testified that "the conference was in the nature of an appeal, the man was appearing before me as Deputy Assistant Secretary and he was entitled to have his day in court" (Gov't. Br. p. 23).

Panuch is an attorney (R. 58). Petitioner is not. Aside from the fact that Panuch's characterization of the interview was not communicated to petitioner at the time, but was reserved for testimony at the trial, it is apparent that Panuch did not regard the matter seriously enough to find out about or have before him a record of the prior proceedings, which, presumably, constituted the basis of the "appeal"; to advise petitioner of the charges in advance, although a month elapsed between the request for the resignation and the interview, the date and place of which was fixed by Panuch (R. 48); to have other State Department officials or even a stenographer present; to advise petitioner of his rights; to conduct the interview with formality;

to reduce the interview to writing; or otherwise to afford petitioner what a lawyer would normally regard as the requirements of "a day in court", if he was serious about the matter. That petitioner was "capable" of knowing that Panuch's inquiries related to a matter within the jurisdiction of the Department (Gov't. Br. p. 24) is no substitute for the fact that petitioner was not, as was his right, actually and adequately informed that his statements, if false, were on a matter within the jurisdiction of the United States punishable under the statute.

The government apparently construes the statute as if it exempted false statements made in casual conversation but punished such statements if made in serious conversation. The court below construes the statute to apply to any false statements, casual or serious, but holds that the statute meets the test of constitutional definiteness because the discussion in this case was "official". There is nothing in the statute, we submit, which warrants these distinctions.

The holding of the *Gilliland* and the other cases cited by petitioner (Pet. 22, ftn. 21) requires that false statements to be punishable, must be made in a particular matter within the jurisdiction of the United States, and that matter must be brought home to petitioner under regulations or their equivalent which provide suitable notice of the criminal consequences involved, under definitely ascertainable standards of guilt. By equating "serious" or "official" to the language of the statute, the government and the court below have given the statute a novel and unwarranted construction which requires decision by this Court.

3. The government's answer to the petitioner's second contention (Pet. 23-33) is limited to a partial and, we sub-

mit, insubstantial justification of the decision of the court below.

A. The government does not deny that the nine barred counts contained prejudicial and inflammatory matter which would not have been submitted to the jury, had the trial court ruled correctly with respect to the statute of limitations. The government does not recede from its previous position that some of these matters had been abandoned, or deny that the trial court failed to instruct the jury as to the fact of such abandonment, or question the applicability of the holding in the *Nash* case[4] (Pet. 23-25).

B. Nor does the government deny that certain of the evidence admitted under the barred counts constituted proof of other separate crimes under other Federal and State laws or was of such a nature as to be as prejudicial in its effect upon the jury as proof of other crimes (Pet. 10-11, 25-28). Its sole support for the ruling of the court below on this issue is that such evidence was relevant to membership in the Communist Party, was not received only in respect of any of the first nine counts, and, was therefore admissible to prove the crime charged in Count 10 even though it proved other crimes as well (Gov't. Br. p. 25, ftn. 12).

The government cites the *Krulewitch*[5] case as its authority. But that case involved a prosecution for transporting a woman in interstate commerce, for the purpose of prostitution, under the White Slave Traffic Act (Cr. Code 37, 18 U. S. C. A. Sec. 88, 398-399) where purpose and

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[4]*United States* v. *Nash*, 229 U. S. 373, 379-380 (1912).
[5]*United States* v. *Krulewitch*, 145 F. 2d 76 C. C. A. 2 (1944).

intent were essential elements of the crime. And, even in that case, under that statute, the court held that the admission of evidence of the separate crime of rape constituted prejudicial and reversible error, (145 F. 2d 80) even though the trial court carefully instructed the jury as to the use to which it might put such evidence (id. 81).

In the case at bar, two pertinent facts stand undenied: first, that purpose or intent is not an element of the statute here involved; and second, that the record is barren of any evidence of prohibited advocacy by the Communist Party, constituting proof of other separate crimes (Pet. 26-27). Consequently, evidence that petitioner engaged in such prohibited advocacy is not relevant to prove that he was a member of the Communist Party; such evidence of other crimes is not admissible on any issue of intent; and, in any event, the trial court failed to instruct the jury to consider such evidence only on the issue of intent. The evidence was admitted under specific allegations of the indictment which the court below held were not validly included in the trial. If relevant at all, such evidence was relevant only to such counts, and not to prove other irrelevant crimes. The dictum of the *Krulewitch* case is not applicable. The government, we submit, has failed to meet petitioner's contention that the admission of this evidence of other separate crimes, under these circumstances, constitutes prejudicial error.

C. As to petitioner's contention that the admission in evidence of his nine statements to the F. B. I. and the Commission under the nine barred counts was prejudicial in the trial of the last two counts (Pet. 11-12-28-31) the government's answer is that assuming, *arguendo*, that such evidence would not have been admissible under the last two counts, the evidence was not hurtful to petitioner, but on

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the contrary beneficial and that "It is difficult to understand how evidence of such denials could possibly prejudice petitioner, unless and until the jury found that petitioner had been a member of the Communist Party and had used an alias. Once these findings were made, the jury could not very well have escaped a finding of guilt as to Counts 10 and 11" (Gov't. Br. p. 26).

This formulation of the problem presents, but does not justify the prejudicial error. For, once the jury had concluded that petitioner had lied in formal, sworn statements that he was not a member of the Communist Party and had not used an alias, under the first nine counts, which were not validly on trial, it is, indeed, probable that *for that very reason* it could not have escaped a finding that petitioner knowingly, wilfully and criminally lied about the same subject matter in his informal and unsworn statements under the last two counts.

The government's argument assumes either that advantages only accrued to petitioner from his nine earlier statements or that the jury weighed only his last two statements against the proof of his activities in 1940-1941, without reference to the fact that it had already found him guilty of nine separate crimes in the making of his nine earlier statements. These assumptions do violence to the reality by abstracting the last two counts from the total setting of the trial. The nine earlier sworn formal and documented statements *were* considered by the jury and must necessarily have had a prejudicial effect on the issue of petitioner's knowledge and wilfulness in the making of the unsworn, informal and unrecorded statements in the last two counts. Since the nine earlier statements were charged as, and constituted proof of nine separate crimes,

of which the jury found petitioner separately guilty, and proof of crimes is hardly beneficial to a defendant, it is sophistry to claim that only advantages accrued to petitioner from such evidence.

D. As to petitioner's contention that he was erroneously sentenced (Pet. 31-32), the government answers with *Pinkerton* v. *United States,* 328 U. S. 640, 641-642, which it asserts forecloses the argument (Gov't. Br. p. 27). But, in that case, the reported proceedings do not show that the question was raised in the court below or that the presumption of law—that the court awarded sentence on the good count only—was rebutted, as it was here, by the presence in the record of the ruling by the trial court that each of the eleven counts on which it imposed its general sentence constituted a separate, valid crime and by exceptions taken to erroneous instructions on the first nine counts in petitioner's motion for judgment of acquittal and new trial (R. 31, 46). The government's suggestion that petitioner's remedy is provided by Rule 35 of the Federal Rules of Criminal Procedure is beside the point. If the general sentence on eleven counts was error, this Court may correct the error. Cf. *Braverman* v. *U. S.,* 317 U. S. 49 (1942). *Dwyer* v. *United States,* 170 Fed. 160, 166, C. C. A. A. (1909). Rule 35 is addressed to the discretion of the trial court and does not foreclose the assertion of a right.

4. The government's answer (Gov't. Br. pp. 27-28) to petitioner's final contention that the trial court failed to treat the predominantly Negro jury in the case as a representative jury is a mere restatement of the opinion of the court below which fails entirely to answer the specific errors asserted as to that opinion by petitioner (Pet. 12-16, 33-35).

The importance of the question is conceded, and, if, as we assert, the disputed rulings of the trial court were erroneous under the ordinary rules of evidence, they cannot be justified by the supposed inability of the predominantly Negro jury to consider the evidence on the same terms as any other representative jury. The question presented, therefore, is both a constitutional question and one which warrants the exercise by this Court of its supervisory powers over the Courts of the District of Columbia.

Respectfully submitted,

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